SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
DEC 6 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 19...

No. 443

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Petitioner,

versus

CITY OF ALEXANDRIA, LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WRIGHT, LINDSEY, JENNINGS,
LESTER & SHULTS,
P. O. Box 3707,
Little Rock, Arkansas,
PROVOSTY, McSWEEN, SADLER
& SCOTT,
601 Guaranty Bank Building,
Alexandria, Louisiana,
Attorneys for Petitioner.

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
BASIS FOR FEDERAL JURISDICTION	7
ARGUMENT:	
I. Interstate Commerce regulated exclusively under Interstate Commerce Act	8
II. No abandonment of lien without prior authority of Interstate Commerce Commission	9
III. Illegal abandonment may be enjoined	17
IV. Plaintiff entitled to an injunction as a matter of right	18
V. Errors of Court of Appeals in opinion of November 30, 1962	20
VI. Errors of Court of Appeals in opinion of June 30, 1963	26
CONCLUSION	28

INDEX—(Continued):

Page

APPENDIX A—Opinion of United States District Court for the W. D. La. dated July 11, 1961 31

APPENDIX B—Judgment of the United States District Court for the W. D. La. dated February 2, 1962 41

APPENDIX C—Opinion of the Court of Appeals, 5th Cir. dated November 30, 1962 45

APPENDIX D—Opinion of the Court of Appeals, 5th Cir. dated July 30, 1963 55

APPENDIX E—Stay Order granted by Court of Appeals, 5th Cir. dated August 8, 1963 63

APPENDIX F—Statutes Involved 65

APPENDIX G—Judgment of the Ninth Judicial District Court, Rapides Parish, Louisiana, suit entitled "City of Alexandria vs. Chicago, Rock Island & Pacific Railroad Co." dated June 7, 1960 69

APPENDIX H—Report dated November 17, 1958—In the Matter of the Application of Illinois Terminal Railroad Company, I. C. C. Finance Docket No. 20388 .. 73

TABLE OF CASES CITED.

	Page
Atlantic Coast Line R. Co. v. Delaware H. & R. Corporation, (1936) 886 F. 2d 721	8
Chicago, M., St. P. & P. R. Co. vs. Northern Pac. R. Co., (1954) 120 F. Supp. 710, affirmed 225 F. 2d 840	20
City of Alexandria vs. Chicago, Rock Island & Pacific RR., (1961) 240 La. 1025, 126 So. 2d 351	6
City of Chicago v. Atchison, T. & S. F. Ry. Co., (1958) 78 S. Ct. 1063, 357 U. S. 77, 2 L. Ed. 2d 1174	8
City of Des Moines v. Chicago & North Western Railway Co., (1959) 264 F. 2d 454	3, 13, 26, 27, 28
City of Flint v. Grand Trunk Western R. R. Co., 6 Cir., 69 F. 2d 604	21
Colorado v. United States, (1926) 271 U. S. 153, 153 S. Ct. 170, 70 L. Ed. 878	9
El Dorado & W. Ry. Co. vs. Chicago, R. I. & P. Ry. Co., (1925) 5 F. 2d 777	20
Francis v. Southern Pac. Co., (1948) 68 S. Ct. 611, 33 U. S. 445, 92 L. Ed. 798	8
Hartzberg v. New York Cent. R. Co., (1934) 41 N.Y.S. 2d 345, 181 Misc. 129, cert. denied, 66 S. Ct. 1121, 328 U. S. 849, 90 L. Ed. 1622	8
In re Boston Terminal Co., (1947), 71 F. Supp. 472, 474	11
In the Matter of the Application of Illinois Terminal Railroad Company, I. C. C. Finance Docket No. 20388 (1958)	15
Mackey v. Choctaw, Okla. and Gulf Railway Co., (1921) 256 U. S. 531, 41 S. Ct. 582, 65 L. Ed. 1076	23, 24
Meyers v. Famous Realty, Inc., C.A.N.Y., (1959) 271 F. 2d 811, Cert. denied, 80 S. Ct. 681, 362 U. S. 910, 4 L. Ed. 2d 619	18

TABLE OF CASES CITED—(Continued)

Page

Miller v. Climax Molybdenum Co., (1938) 96 F. 2d 254 ..... 3, 10, 18, 27, 28

Myers v. Arkansas & Ozarks Ry. Corp., (1960), 185 F. Supp. 36 21

Smith v. Hoboken R. R. Warehouse S. S. Connecting Co., (1946) 328 U. S. 123, 66 S. Ct. 947, 90 L. Ed. 1123 ..... 3, 10, 21, 26, 27, 28

T. & T. R. Co. v. Gulf C. & S. F. R. Co., 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578 18

Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, (1926) 46 S. Ct. 263, 270 U. S. 266, 70 L. Ed. 578 ..... 3, 19, 29

Thompson v. Texas Mexican Railway Company, (1946) 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132 ..... 2, 10, 12, 18, 21, 26, 27, 28

Town of Conway v. Atlantic Coast Line R. R., (1926), 20 F. 2d 250 26

Village of Mantorville v. Chicago Great Western R. Co., (1934) 8 F. Supp. 791 10

Williams v. Atlantic Coast Line R. Co., 4 Cir. 1927, 17 F. 2d 17 21

Zirn v. Hanover Bank, 2 Cir., 1954, 215 F. 2d 63 ..... 21, 26

TABLE OF STATUTES

28 U. S. C. A. 1331 7

28 U. S. C. A. 1337 7

49 U. S. C. A. 1 (1) 3, 9

49 U. S. C. A. 1 (4) 9, 27

49 U. S. C. A. 1 (18) 9, 15, 20, 21, 23, 24

49 U. S. C. A. 1 (19) 9

49 U. S. C. A. 1 (20) 17, 18, 24

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19....

No. .....

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Petitioner,

versus

CITY OF ALEXANDRIA, LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Chicago, Rock Island & Pacific Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW.

The opinion of the District Court (R. 48-58) dated December 11, 1961 has been reported in 201 FS 6. A copy is appended as Appendix A.

The opinion of the Court of Appeals (R. 161) dated November 30, 1962 has been reported at 311 F 2d 9. A copy is appended as Appendix C.

The opinion of the Court of Appeals on petition for rehearing (R. 196) dated July 30, 1963 has not been reported. A copy is appended as Appendix D.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 30, 1962 and a petition for rehearing was denied by judgment of the Court of Appeals dated July 30, 1963. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. 1254 (1).

Stay order was granted on August 8, 1963 to enable petitioner to apply for and obtain a writ of certiorari to the Supreme Court of the United States. A copy is appended as Appendix E.

QUESTIONS PRESENTED.

I. The opinion of the Court of Appeals conflicts with the landmark decisions of the United States Supreme Court in *Thompson vs. Texas Mexican Ry. Co.*, (1946) 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132 and

Smith vs. Hoboken R. R. Warehouse S. S. Connecting Co., (1946) 328 U. S. 123, 66 S. Ct. 947, 90 L. Ed. 1123 holding that the abandonment of any part of the main line of a railroad may not be accomplished without prior authority of the Interstate Commerce Commission.

II. The opinion of the Court of Appeals conflicts with decisions of other Courts of Appeals, *Miller vs. Climax Molydenum Co.*, (1938—10th Cir.) 96 F. 2d 254; *City of Des Moines vs. Chicago & North Western Railway Co.*, (1959—8th Cir.) 264 F. 2d 454 holding that the abandonment of any part of the main line of a railroad may not be accomplished without prior authority of the Interstate Commerce Commission.

III. The opinion of the Court of Appeals is in conflict with the decision of the United States Supreme Court in *Texas and Pacific Railway Company vs. Gulf, Colorado & Santa Fe R. Co.*, (1926) 46 S. Ct. 263, 270 U. S. 266, 70 L. Ed. 578 holding that a party at interest seeking to prevent an abandonment of line without authority of the Interstate Commerce Commission, is entitled to an injunction *as a matter of right*.

STATUTES INVOLVED.

The statute principally involved is Interstate Commerce Act, 49 U. S. C. A. 1. et seq., the most pertinent parts of which are:

"(18) . . . no carrier by railroad subject to this chapter shall abandon all or any portion of

a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . ."

"(20) . . . . Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Other statutes involved and the full context of the sections above referred to are set out in Appendix F, *infra*, pp. 65-68.

STATEMENT.

The facts are not disputed. Plaintiff is an interstate common carrier by railroad with a main line extending from Little Rock, Arkansas into Louisiana through Alexandria to Eunice, Louisiana. Plaintiff's main line in Louisiana is interconnected with its railroad system at Little Rock, Arkansas and its principal

interconnections with other railroad lines along this segment of its railroad system are the following: The Missouri Pacific and the St. Louis Southwestern at Little Rock, Arkansas; The Bauxite and Northern at Bauxite, Arkansas; The Missouri Pacific at Benton, Arkansas; the Fordyce and Princeton, and the St. Louis Southwestern at Fordyce, Arkansas; The Warren and Saline River Valley at Hermitage, Arkansas; the Arkansas & Louisiana Missouri, and the Ashley Drew & Northern at Crossett, Arkansas; the El Dorado and Wesson, and the Missouri Pacific at El Dorado, Arkansas; the Illinois Central at Winnfield, Louisiana; the Illinois Central at Ruston, Louisiana; the Arkansas & Louisiana at Winnfield, Louisiana; the Texas & Pacific, the Missouri Pacific, the Southern Pacific, and the Louisiana & Arkansas at Alexandria, Louisiana; and the Missouri Pacific and the Southern Pacific at Eunice, Louisiana. In 1958 the City levied a $38,530.85 paving assessment against approximately 2,750 feet of plaintiff's main line through Alexandria, Louisiana to Eunice, Louisiana for the paving of Broadway Street.

Plaintiff refused to pay the assessment and defended the suit subsequently filed by the City on the ground that it was so arbitrary and confiscatory as to render the assessment unconstitutional and on the further ground that the right-of-way for Broadway Street had been formally donated to the public by plaintiff on the expressed and accepted condition that plaintiff would not be assessed for the cost of its improvement. The City sued and obtained an *in rem* judgment recogniz-

ing the validity of its lien, which judgment was affirmed by the Louisiana Supreme Court in *City of Alexandria vs. Chicago, Rock Island & Pacific RR.*, (1961) 240 La. 1025, 126 So. 2d 351. Plaintiff is not personally indebted to the City of Alexandria. A portion of plaintiff's main line railroad between Alexandria, Louisiana and Eunice, Louisiana is constructed, located and situated on the strips of land covered by the paving lien above referred to and plaintiff has no other route or alternative route from Alexandria to Eunice, Louisiana. The Sheriff of Rapides Parish, pursuant to a writ of *Fieri Facias*, seized approximately 2,750 feet of plaintiff's main line right-of-way and advertised it to be sold at public sale on June 28, 1961. Thereupon plaintiff applied to the U. S. District Court for an injunction on the ground that the contemplated sale would accomplish an abandonment of line without first obtaining authority of the Interstate Commerce Commission. After regular hearing the District Judge rendered an opinion on December 11, 1962 granting the injunction subject to the City's right to (a) apply to the Interstate Commerce Commission for an abandonment, the injunction to expire upon issuance of an order of abandonment; or (b) to sell immediately that portion of the right-of-way subject to the lien less and except a 20 foot strip located 10 feet on either side of the center line of plaintiff's main line railroad tracks, the sale of which 20 foot strip would continue to be enjoined until such time as the Interstate Commerce Commission issued a formal order of abandonment. Judgment was signed February 1, 1962. The District Court left the City free to sell

immediately, to satisfy its $38,530.85 lien, that portion of the 2,750 foot right-of-way extending about 65 feet to the west of the 20 foot strip and that portion thereof extending about 40 feet to the east of the 20 foot strip, valued at $78,500. The Court of Appeals reversed the District Court and remanded the cause with instructions to dissolve the injunction. Plaintiff's application for rehearing was denied.

BASIS FOR FEDERAL JURISDICTION.

Federal jurisdiction in the Court of first instance is based upon the following:

(a) The matter in controversy excluding interest and costs exceeds the sum of $10,000.00. Jurisdiction exists under the provisions of the judicial code of the United States because the parties are citizens of different states (28 U. S. C. A. 1331).

(b) The Court also had jurisdiction of a civil action arising under the Interstate Commerce Act to prevent an abandonment of railroad line whenever the abandonment is made without authority of the Interstate Commerce Commission (28 U. S. C. A. 1337).

ARGUMENT.

I.

The Operation of Railroad Common Carriers in Interstate Commerce is Regulated Exclusively under the Provisions of the Interstate Commerce Act.

Congress is given exclusive power under the Constitution, Article 1, Section 8, to regulate commerce "among the several States". After the passage of the Interstate Commerce Act all common law remedies inconsistent therewith, *Atlantic Coast Line R. Co. v. Delaware H. & R. Corporation*, (1936) 886 F. 2d 721, and all State law inconsistent therewith, *Francis v. Southern Pac. Co.*, (1948) 68 S. Ct. 611, 33 U. S. 445, 92 L. Ed. 798, were superseded by the Act. National control over interstate railroad transportation, rather than local control, has been the policy of Congress, *City of Chicago v. Atchison, T. & S. F. Ry. Co.*, (1958) 78 S. Ct. 1063, 357 U. S. 77, 2 L. Ed. 2d 1174, and enactment of the Interstate Commerce Act excluded any State's power to control interstate commerce, *Hartzberg v. New York Cent. R. Co.*, (1934) 41 N.Y.S. 2d 845, 181 Misc. 129, cert. denied, 66 S. Ct. 1121, 328 U. S. 849, 90 L. Ed. 1622.

II.

Plaintiff is Required, under the Authority of the Interstate Commerce Act, to Provide Interstate Transportation over its Established Routes and no Abandonment or Extension of Line May Be Accomplished without Prior Authority of the Interstate Commerce Commission.

Plaintiff is a common carrier in interstate commerce, 49 U. S. C. A. 1 (1), and as such, is required in the public interest and under the provisions of the act, 49 U. S. C. A. 1 (4) to provide interstate transportation over its established routes. Consequently, no railroad line in interstate commerce, except those specifically excluded by the act, may be abandoned without authority of the Interstate Commerce Commission, 49 U. S. C. A. 1 (18):

> "... and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Such abandonment may be authorized only after application, due notice, and hearing 49 U. S. C. A. 1 (19); *Colorado v. United States*, (1926) 271 U. S. 153, 153 S. Ct. 170, 70 L. Ed. 878.

> "As every projected abandonment of any part of a railroad engaged in both interstate and in-

trastate commerce may conceivably involve a conflict between state and national interests, the consent of the Commission must be obtained by the railroad in every case. To ensure due consideration of the local interests, Congress provided that a copy of every application must be promptly filed with the governor of the state directly affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities should have the 'right to make before the Commission such representations as they may deem just and proper for preserving the rights and interests of their people and the states, respectively, involved in such proceedings.'"

The exclusive power of the Commission was subsequently recognized in *Village of Mantorville v. Chicago Great Western R. Co.*, (1934) 8 F. Supp. 791; and in *Miller v. Climax Molybdenum Co.*, (1938) 96 F. 2d 248. Both of the above are abandonment of line proceedings in which the court refused to enforce perfectly legal contracts which the Interstate Commerce Commission found to be against the public interest.

Finally in 1946 the United States Supreme Court rendered the landmark decisions of *Smith v. Hoboken R. R. W. S. S. C. Co.*, (1946) 328 U. S. 123, 66 S. Ct. 947, 90 L. Ed. 1123, and *Thompson v. Texas Mexican Railway Company*, (1946) 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132,[1] the holding of which cases is quoted

[1] For the sake of brevity these cases shall be referred to as the *Hoboken* case and the *Texas Mexican* case.

from *In Re Boston Terminal Co.*, (1947) 71 F. Supp. 472:

"In the Hoboken case a lessor was granted the right by the lower court to terminate a lease over its lines of railroad because of the presence of a forfeiture clause in the lease. The Supreme Court held that this was an abandonment of operation by the lessee and its trustee even though the trustee took no part in the proceedings. The court made it plain that before it could be done a certificate should have been obtained from the Commission in accordance with the requirements of Section 1 (18) of the Act. In the Texas Mexican case the court held that a company having trackage rights over the lines of another must receive authorization to abandon its operations. In that case the trackage agreement was terminated by the grantor in accordance with a termination clause after the reorganization proceedings had begun. The trustee took no part in the termination. In both these cases abandonment of the operation of the carrier was attempted without any active step taken by the trustee. Discontinuance of operation was forced on the carrier from without. Here we have a case that appears to be a parallel one to these cases. The mortgagee here is in the same position of the lessor in the Hoboken case and the grantor in the Texas Mexican case. Discontinuance of operation by the trustee would be forced on him by foreclosure proceedings. Such a discontinuance would be an abandonment of operations by a carrier within the meaning of Section 1 (18) of the Act and the cases cited. Section 1 (18) was evidently enacted

for the protection of the public which has a paramount interest in the continuance of a particular carrier's operations. Whether the public interest requires that the South Station Terminal be operated by Terminal or its trustee rather than by the mortgagee or a purchaser presents a question for the Commission under Section 1 (18) of the Interstate Commerce Act. Smith v. Hoboken R. Co., supra, 328 U. S. at page 130, 66 S. Ct. 947. It is my opinion that before this petitioner can foreclose and discontinue operations by the Terminal trustee, a certificate under Section 1 (18) of the Act should be obtained from the Commission."

In the *Texas Mexican* case the court stated:

"The authority of the Commission under Section 5 (2) (a) extends to fixing terms and conditions, including rentals, for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. *Until abandonment is authorized, operations must continue. While they continue, trackage rights are being enjoyed. In absence of administrative control, the law would under those circumstances imply a contract for the use of another's property and award reasonable compensation. Thus trackage rights would be acquired on such terms as the*

court and jury determined. But Section 5 (2) (a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive."

The situation present in *City of Des Moines v. Chicago & North Western Railway Co.*, (1959) 264 F. 2d 454, is almost identical with the situation here. In that case suit was brought by the City to enjoin the railroad company from using its tracks located in a city street and to remove its tracks and roadbed on the ground that the railroad was guilty of "continuous, unreasonable and unlawful blockading" of five main thoroughfares, that the growth of the entire business district was being retarded, that it was a material obstruction to traffic and that the railroad had violated the ordinance authorizing its right-of-way. In refusing the injunction the Court held:

"Regardless, however, of whether a valid forfeiture would have existed under the ordinance, *a court could still not decree an ouster of the Railway from the street, so long as this might mean an abandonment or discontinuance of a portion of the Railway's line or operation in the interstate field, until the Interstate Commerce Commission gave its permission to such abandonment or discontinuance being made.* Thompson v. Texas Mexican Ry. Co. 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132; Smith v. Hoboken R. R. Warehouse & S. S. Connect. Co. 328 U. S. 123, 66 S. Ct. 947, 90 L. Ed. 1123."

"In short, any question, necessary to a judicial disposition, relating to change in railroad line or operation, on which there is room for colorable doubt or controversy as to whether public convenience and necessity is involved or is affected, and in which it therefore may be possible for an abandonment to be present in a transportational sense, even though not by general legal criterion, must ordinarily be referred to the Commission for answer; and this is true regardless of the fact that the Commission may on presentation thereof see fit to conclude that the situation does not require it to make a finding in relation to public convenience and necessity as a question of abandonment."

"On all these considerations, it seems clear to us that the situation is one which a court does not have an initial right to examine and appraise, but which must be referred to the Commission for answer, before any ouster could at all be decreed, on whether such changes are capable of being made as not to affect the public convenience and necessity being served and so perhaps not to require authorization from the Commission of abandonment, or whether if public convenience and necessity will be affected, this convenience and necessity nevertheless will permit of such differences in service, or abandonments as may be entailed."

It is clear from the above authorities that abandonment proceedings before the Interstate Commerce Com-

mission are necessary and the prerequisite of any change or alteration of line or line operation which may affect the public interest. This is true whether it be a change in operators, a renegotiation of an existing trackage agreement, or a relocation of line. It is certainly true where the contemplated or threatened change, as the sale contemplated by the City of Alexandria, will deprive plaintiff of all its rights and title to a portion of its main line. The Interstate Commerce Act (49 U. S. C. A. 1 (18)) requires that the status quo be maintained, until the Commission, after due notice to interested parties and a hearing, shall determine whether the public interest will be served or will be damaged by the contemplated or threatened change. Certainly the Commission's capacity to act will be seriously curtailed, if, as the City has suggested, there can be no abandonment within the meaning of 49 U. S. C. A. 1 (18), until the railroad is physically ousted from possession.

The authority of the Commission is broad and has been exercised consistently and without hesitation. The Commission made the following comment on a challenge to its jurisdiction "In the Matter of the Application of Illinois Terminal Railroad Company", I. C. C. Finance Docket No. 20388 (1958), Appendix H:

> "Under Section 1 (18) of the act it is made unlawful for any carrier by railroad to abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained a certificate from this Commission that the present or future public conveni-

ence and necessity permit of such abandonment. The provision is two-fold, applying not only to abandonment of operation but also to abandonment of 'all or any portion of a line of railroad'. That the track over the approaches and the bridge constitute a portion of the main line of the applicant is indisputable. The fact that the applicant, after it conveys the title to the city, will be granted rights to operate over the railroad portions of the bridge and approaches does not alter the nature of the antecedent sale, under which it will dispose of all its rights in the line.

A somewhat similar situation to that presented here is where a line of railroad is to be abandoned and in lieu thereof the carrier acquired trackage rights over, or joint use of, the paralleling lines of another. In such cases we have held, that approval of this Commission is necessary under section 1 (18) for the abandonment and for construction of connecting tracks that may be required, and that appropriate authority also must be obtained for use of the parallel tracks. Sacramento N. Ry. Trackage Rights, 290 I. C. C. 145, and 290 I. C. C. 229. In Finance Docket No. 18992, Great Northern R. Co. Acquisition, 295 ... (not printed in full), decided December 6, 1955, we took jurisdiction over a transaction involving abandonment by the Great Northern and the Minneapolis, St. Paul and Sault Ste. Marie Railway Company of certain segments of their respective lines and the acquisition by them of an undivided one-half interest in, and joint use of, the paralleling line of the other.

Even if the two conveyances, or grants, here involved, i.e., the sale and the lease-back, are

co. idered as a single transaction, *it is clear that the result thereof will be a substantial diminution in the applicant's title, and to the extent of such diminution there will be a relinquishment, or abandonment,* by the applicant of the line of railroad involved. The fact that the lease is for a long term, with options to renew in perpetuity, is not material in determining our jurisdiction. Under the theory advanced by applicant, since there is no immediate intention to abandon operation, section 1 (18) would not apply even if the term of the lease-back were limited to one year and regardless of the terms, onerous or otherwise, which might be imposed upon the carrier as a condition to exercise of its right to operate over its line. *If a railroad in such manner and without our approval may dispose of its interest in all or a part of its line, and in substitution thereof acquire a sharply limited or similar interest under terms over which we may exercise no control, it could thereby disable itself from fulfilling its common carrier obligations.* Thus, the purpose and intent of section 1 (18), which we are required to administer and enforce with a view to carrying out the expressed national transportation policy of the Congress, would be defeated."

III.

Abandonment of an Interstate Railroad Line without Authority of the Interstate Commerce Commission may be Enjoined by any Party at Interest.

The Interstate Commerce Act provides, 49 U.S.C.A. 1 (20) that:

"* * * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; *and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.*"

It is clear that injunction is the only proper remedy to prevent an illegal abandonment or illegal extension of line and that the United States District Court is the only forum having jurisdiction. *Meyers v. Famous Realty, Inc.*, C.A.N.Y., (1959) 271 F. 2d 811, Cert. denied, 80 S. Ct. 681, 362 U.S. 910, 4 L. Ed. 2d 619; *T. & T. R. Co. v. Gulf C. & S. F. R. Co.*, 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578, *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134; 66 S. Ct. 937, 90 L. Ed. 1132. *Miller v. Climax Molybdenum Co.*, (1938) 96 F. 2d 254.

IV.

Plaintiff, under the provisions of 49 U.S.C.A. 1 (20), is entitled to an injunction as a matter of right.

Under the provisions of the Act, 49 U.S.C.A. 1 (20), Plaintiff is entitled to an injunction as a matter of

right. In *Texas & Pacific Railway Company vs. Gulf, Colorado & Sante Fe Railway Company*, (1926) 46 S. Ct. 263, 270 U.S. 266, 70 L. Ed. 578, the Plaintiff sought to enjoin a proposed extension of line by defendant who had not secured a certificate of convenience and necessity from the Interstate Commerce Commission. Defendant urged that the proposed line was not "an extension", but was a "spur track" or "industrial track", and that the Court was without jurisdiction until the Commission had determined that the track was in fact an extension. The Court rejected this argument in holding that the injunctive remedy afforded by Section 1 (20) of the Interstate Commerce Act is the opponent's sole remedy, and is both affirmative and complete. The court stated:

> "The function of the court upon an application for an injunction under Paragraph 20 is a very different one from that exercised by the Commission when, having taken jurisdiction under Paragraphs 19 and 20, it grants or refuses a certificate. The function confided in the Commission is comparable to that involved in a determination of the propriety or application of a rate, rule or practice. It is the exercise of administrative judgment. Where the matter is of that character, no justiciable question arises ordinarily until the Commission has acted. Compare Great Northern R. Co. v. Merchants Elevator Co. 259 U.S. 285, 295, 66 L. Ed. 943, 948, 42 Sup. Ct. Rep. 477. The function of the court upon the application for an injunction is to construe a statutory provision and apply the provision as construed to the facts. The

prohibition of Paragraph 18 is absolute. If the proposed track is an extension and no certificate has been obtained, *the party in interest opposing construction is entitled as of right to an injunction.* The issue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier."

The Court affirmed the decree of the District Court "enjoining the construction or operation of the line unless and until the prescribed certificate should have been obtained." Permanent injunctions of a similar nature have issued in *El Dorado & W. Ry. Co. vs Chicago, R. I. & P. Ry. Co.*, (1925) 5 F. 2d 777; *Chicago, M., St. P. & P. R. Co. vs. Northern Pac. R. Co.*, (1954) 120 F. Supp. 710, affirmed 225 F. 2d 840.

V.

Errors of the Court of Appeals in its Opinion of November 30, 1962, Appendix C.

This point will be treated only superficially, since a more detailed treatment thereof can be found in the memorandum attached to plaintiff's petition for rehearing, R. 172.

(a) The Court's finding that "abandonment" as contemplated by 49 U.S.C.A. 1 (18) requires *intent* on the

part of the operating carrier, is error. In none of the cases cited above, Point II, including the *Hoboken* and *Texas Mexican* cases, did the operating carrier intend to abandon. Yet each case was decided on authority of 49 U.S.C.A. 1 (18). The cases cited by the Court in its opinion had not been urged upon it by defendants and are inapplicable. *Williams v. Atlantic Coast Line R. Co.*, 4 Cir. 1927, 17 F. 2d 17, which is actually quoted in the opinion, is authority only for the proposition that the railroad has not abandoned title to *land* (not line) which it had allowed the public to use as a thoroughfare, and enjoined the city's attempt to pave it. *City of Flint v. Grand Trunk Western R. R. Co.*, 6 Cir., 69 F. 2d 604, held that the informalities of the city's original abandonment were cured by its acquiescence in abandonment of a *street* (not line) for a period of twenty-six (26) years. *Zirn v. Hanover Bank*, 2 Cir., 1954, 215 F. 2d 63, involved an attempt by the debtor to avoid foreclosure of a mortgage on certain rolling stock (not line) and the Court was not called upon to determine whether or not there was an abandonment of line. *Myers v. Arkansas & Ozarks Ry. Corp.*, (1960), 185 F. Supp. 36 is authority only for the proposition that bridge and roadbed washouts resulting from a severe storm, constituted a temporary abandonment and not an abandonment as contemplated by 49 U.S.C.A. 1 (18).

Obviously some abandonments are voluntary on the part of the operating carrier, and some are involuntary. But is the public interest affected by this difference?

Authority of the Interstate Commerce Commission is required whether the abandonment be voluntary or involuntary, because the effect on the public is the same. There has been no showing that the shipper, the community, or the connecting carrier deprived of transportation services by a voluntary abandonment, would be damaged less if the abandonment had been involuntary. The deprivation of transportation service has the same effect on the public in either instance.

(b) The Court's finding that plaintiff has the "legal obligation" to pay the city's *in rem* judgment, is made without authority and is error. That portion of the right-of-way of Broadway Street abutting its property, was donated by plaintiff to the public and accepted by the public under the specific condition that plaintiff would not have to pay for any improvements thereon. The city received the right-of-way for Broadway Street without the necessity of expropriation and without any cost whatsoever. It force-paved Broadway without the petition of the property owners, and sought to compel payment from plaintiff by threat of seizure and sale of its main line tracks, all in violation of the condition of the donation. Plaintiff certainly feels no *moral* obligation to pay the city's assessment. Certainly, plaintiff has no *legal* obligation to pay under the judgment of the Ninth Judicial District Court, Appendix G, which recognized the validity of the City's lien, but specifically limited the effects of its judgment as follows:

"Said judgment to be *in rem* only and limited in its effect to the foregoing property."

(c) The Court's finding that "even a transfer of title to a third person is not necessarily inconsistent with the railroad's continued operation of the line; operations could be continued without interruption, as a result of the railroad's negotiations with the purchaser or the railroad's exercising its right of eminent domain under Louisiana Law" is error. Appendix C, p. 50. This finding is made without any supporting authority whatsoever. It is mentioned solely because it is so patently inconsistent with all the authorities cited above, Point II, that it illustrates the arbitrary nature of the Court's opinion, Appendix C. If the Court is correct, it is difficult to conceive of any situation in which 49 U.S.C.A. 1 (18) could properly be applied.

(d) The Court's citation of *Mackey v. Choctaw, O. & G. Ry.*, (1921) 256 U.S. 531, 41 S. Ct. 582, 65 L. Ed. 1076, as authority for the principle that the City may sell plaintiff's main line right-of-way without prior authority of the Interstate Commerce Commission, Appendix C, p. 53, is error. This is the only case cited in the opinion, Appendix C, which was urged upon the Court by defendants. The case was specifically considered by the district court, R. pp. 53, 54, which found that the case is authority only for the finding that the city's lien is valid, a fact which has never been denied by plaintiff since the inception of this

suit. The *Choctaw* case specifically refused to pass on the enforceability of the lien. But the Court of Appeals knowingly and arbitrarily ignored this limitation and proceeded to decide this case on the basis of the *Choctaw* decision, observing, "However, Rock Island makes the same argument against *enforcement* that Choctaw made against *assessment*," Appendix C, p. 53.

The *Choctaw* case was decided by the Court of Appeals, Eighth Circuit, on October 6, 1919. The question of enforcement was expressly before the Court because the suit was brought "to have declared void a special assessment for street improvement, . . . and to enjoin the taking of any proceeding to enforce the same." The Court of Appeals held that the assessment was valid and that the lien was enforceable. However, between the date of that holding and June 1, 1921, the date on which the case was decided by the Supreme Court, the Transportation Act of 1920, including 49 U.S.C.A. § 1 (18)-(20), was passed, prohibiting abandonment of main line without prior authority of the Interstate Commerce Commission. Any interested party was given the power to enjoin such unauthorized abandonment by proper application to the courts. Thus, the "enforceability" portion of the Court of Appeals judgment was overruled by statute. Thereafter, the Supreme Court, while upholding the validity of the assessment, specifically refused to hold that it was enforceable:

"If the validity of the assessment is established, it may be assumed that due payment will follow. At all events, we have no occasion to deal now with the method and means to be pursued in enforcing it."

The Court erred in using this case as authority for the enforceability of the city's lien.

(e) The Court is in error in finding that the collection of taxes against railroad properties would be seriously hampered, Appendix C, p. 53. There is only a superficial similarity between ad valorem taxes and a paving assessment. The taxes are uniform and are limited to a percentage of assessed value. They can be enforced against all types of railroad property except main line. Paving assessments on the other hand are set solely by the cost of the improvement and occasionally exceed the value of the abutting property. The ordinary citizen finds some protection in the latter case in simply allowing the property to be sold at public sale. The taxing authority's only satisfaction is found in what the property may bring. The same is true in this case. The City should have known, and, as a matter of law, is presumed to have known that the threatened seizure and sale of plaintiff's line could not be accomplished without prior authority of the Interstate Commerce Commission. Under the judgment of the District Court, Appendix B, the City can sell plaintiff's entire right-of-way, except the twenty foot strip upon which plaintiff's line is located. The

City's lien amounts to $38,530.85. The City itself has valued the right-of-way, exclusive of the twenty foot strip, at $78,500, Appendix C, p. 46, note 2. Since the City's lien can be satisfied by the sale of that portion of the property available under the U. S. District Court's judgment, Appendix B, why must tracks be sold?

VI.

Errors of the Court of Appeals in its opinion denying a re-hearing, Appendix D.

Re-hearing was denied by the same Judge who handed down the original judgment in the Court of Appeals.

(a) The only additional authority cited by the Court in this opinion in support of its findings in its original opinion, Appendix C, it is *Town of Conway v. Atlantic Coast Line R. R.*, (1926), 20 F. 2d 250, to the effect that authority of the Interstate Commerce Commission is not necessary to abandon where the railroad is a trespasser. This is a district court case decided prior to and without the benefit of the *Hoboken* and *Texas Mexican* cases. It has been cited in *Zirn v. Hanover Bank, Supra*, which held that foreclosure on rolling stock was not an abandonment of line. It was also cited in *City of Des Moines v. Chicago & North Western Ry. Co., Supra*, where it was distinguished in a lower court on the ground that the railroad was dispossessed in 1912, long before the passage of the Trans-

portation Act of 1920. The Court of Appeals, Eighth Circuit, in that case had the following comment:

> "And to the extent that Town of Conway v. Atlantic Coast Line R. R. Co., D.C.E.D.S.C., 1926, 20 F. 2d 250, on which the City relies, gives recognition to such an exception or exemption in Interstate Commerce Commission domain, we must refuse to follow it."

(b) The balance of the opinion of July 30, 1963, is devoted to distinguishing the authorities relied on by plaintiff. In *Miller v. Climax Molybdenum Co., Supra*, the Court found a difference because there was threat of a violation of an order by the Interstate Commerce Commission refusing permission to abandon a line. Plaintiff maintains that this is a distinction without a difference. The said order only maintained the status quo, in that all main line operations must be continued, 49 U.S.C.A. 1.(4) until the Commission authorizes abandonment. The Court distinguishes *City of Des Moines v. Chicago & North West Ry. Co., Supra*, on the ground that the City was demanding that the railroad physically remove its main track. Plaintiff maintains that there is no difference. Certainly, the "scheme of regulation" is equally affected by the granting of the relocation of line in one case (*Des Moines*) or the sale of main line on the other (this proceeding). The Court of Appeals attempted to distinguish the *Hoboken* case and the *Tex-Mex* case on the ground that they were proceedings in a bankruptcy court, "mainly concerned over the proper adjustment

of the Interstate Commerce Act with the Bankruptcy Act." This implies that the decision would have been different in the absence of a bankruptcy reorganization. An examination of the cases will disclose that this distinction is not valid. Also it fails to take into consideration that the *Texas-Mexican* case was not a case in a Court of Bankruptcy. It was appealed to the United States Supreme Court from the highest State Court in the State of Texas.

CONCLUSION.

The opinion of the district court is amply supported by authority and is correct.

The opinions of the Court of Appeals, reversing the district court, are in error and are arbitrary because, without cited authority they:

(a) conflict with decisions of the United States Supreme Court in *Thompson v. Texas Mexican Ry. Co., Supra*, and *Smith v. Hoboken R.R. Warehouse S. S. Connecting Co., Supra;*

(b) conflict with the decision of the Court of Appeals, Tenth Circuit, in *Miller v. Climax Molybdenum Co., Supra*, and the Court of Appeals, Eighth Circuit, in *City of Des Moines v. Chicago & North Western Ry. Co., Supra;*

(c) and with the decision of the United States Supreme Court in *Texas & Pacific Ry. Co. v. Gulf, Colorado & Sante Fe Ry. Co., Supra.*

This petition for a writ of certiorari should therefore be granted.

Respectfully Submitted,

LeDOUX R. PROVOSTY,
RICHARD B. SADLER, JR.,
NAUMAN S. SCOTT,
Counsel for Petitioner,
601 Guaranty Bank Building,
Alexandria, Louisiana.

APPEARANCE.

The undersigned hereby enters his appearance for Chicago, Rock Island & Pacific Railroad Company, in the above-entitled cause.

LeDOUX R. PROVOSTY,
Counsel for Petitioner,
601 Guaranty Bank Building,
Alexandria, Louisiana.

PROOF OF SERVICE.

I, LeDoux R. Provosty, one of the attorneys for Chicago, Rock Island and Pacific Railroad Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of September, 1963, I served a copy of the foregoing Petition for Certiorari to the Supreme Court of the United States on George B. Hall, attorney for defendants, 620 Murray Street, Alexandria, Louisiana.

I do further certify that Frank H. Peterman, who has made an appearance in this proceeding as attorney for defendants, is now deceased.

LeDOUX R. PROVOSTY,
Attorney for Chicago, Rock Island
and Pacific Railroad Company,
601 Guaranty Bank Building,
Alexandria, Louisiana.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, ALEXANDRIA DIVISION.

CIVIL ACTION No. 8340.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

versus

CITY OF ALEXANDRIA, LOUISIANA; W. GEORGE BOWDEN, JR., MAYOR OF THE CITY OF ALEXANDRIA; WILLIAM H. LAMBDIN, COMMISSIONER OF STREETS AND PARKS OF THE CITY OF ALEXANDRIA; LEROY G. WILSON, COMMISSIONER OF FINANCE AND UTILITIES OF THE CITY OF ALEXANDRIA; AND GRADY L. KELLEY, JR., SHERIFF OF RAPIDES PARISH, LOUISIANA.

FOR PLAINTIFF:

Messrs. Wright, Lindsey, Jennings, Lester & Shults, P. O. Box 3707, Little Rock, Arkansas;

Provosty, McSween, Sadler & Scott, Guaranty Bank Building, Alexandria, Louisiana.

FOR DEFENDANTS:

Frank A. Peterman, P. O. Box 1272, Alexandria, Louisiana.

HUNTER, JUDGE:

Plaintiff seeks a permanent injunction enjoining and restraining the sale of land forming a portion of plain-

tiff's main line in interstate commerce running into and out of Alexandria, Louisiana to Eunice, Louisiana.

On June 23, 1961 this Court temporarily restrained the City of Alexandria from selling the property involved. It was later agreed that this restraining order should be continued in force and effect until the Court ruled on the request for a permanent injunction.

The matter in controversy, excluding interest and costs, exceeds the sum of $10,000. Jurisdiction exists under the provisions of the Judicial Code of the United States because the parties are citizens of different states (28 U.S.C.A. 1331). This Court also has jurisdiction to prevent an abandonment of a railroad line whenever the abandonment is to be made without the authority of the Interstate Commerce Commission (49 U.S.C.A. 1(20)).

The facts which are not in serious dispute are essentially these:

1. Plaintiff is a non-resident of the State of Louisiana, and defendants are residents of the State of Louisiana.

2. The amount in controversy exceeds $10,000, excluding interest and costs.

3. Plaintiff is a common carrier by railroad operating over a system extending through fourteen (14) states, including the States of South Dakota, Min-

nesota, Iowa, Illinois, Missouri, Kansas, Nebraska, Colorado, Tennessee, Arkansas, Oklahoma, Texas, Louisiana and New Mexico, with headquarters in Chicago, Illinois. Plaintiff is a common carrier of both passengers and freight on its railroad system and through a system of inter-change arrangements with other railroad lines.

4. Plaintiff's main line in Louisiana is interconnected with its railroad system at Little Rock, Arkansas, and extends south through Alexandria, Louisiana to Eunice, Louisiana. Plaintiff's principal interconnections with other railroad lines along this segment of plaintiff's railroad system are the following: Missouri Pacific at Little Rock; St. Louis Southwestern at Little Rock, Arkansas; the Bauxite and Northern at Bauxite, Arkansas; Missouri Pacific at Benton, Arkansas; Fordyce and Princeton and the St. Louis Southwestern at Fordyce, Arkansas; the Warren and Saline River Valley at Hermitage, Arkansas; the Arkansas & Louisiana Missouri and the Ashley, Drew and No. at Crossett, Arkansas; Missouri Pacific, El Dorado and Wesson at El Dorado, Arkansas; Illinois Central at Winnfield, Louisiana, the Illinois Central at Ruston, Louisiana; the Louisiana and Arkansas at Winnfield, Louisiana; the Texas & Pacific, the Missouri Pacific, Southern Pacific, and the Louisiana and Arkansas at Alexandria, Louisiana; and the Missouri Pacific and the Southern Pacific at Eunice, Louisiana. Plaintiff maintains lines, depots, stations, operating facilities and equipment along the entirety of its Little Rock-

Eunice line, and employs personnel to operate the line through its entirety.

5. Plaintiff operates and furnishes transportation as a common carrier along its entire main line in Louisiana, but is not a common carrier of passengers in Louisiana. As a common carrier of freight on its Little Rock-Eunice line, plaintiff operates and handles interstate freight shipments as an intermediate carrier, an originating carrier, and a terminating carrier. Such shipments are handled by plaintiff both at Alexandria, Louisiana and at Eunice, Louisiana, and along plaintiff's line between Alexandria, Louisiana and Eunice, Louisiana.

Plaintiff operates regularly scheduled trains on its Little Rock-Eunice main line. Plaintiff operates trains between Eunice and Alexandria, Louisiana, including a regularly scheduled round trip between Alexandria and Eunice, Louisiana daily except Sunday.

6. The City of Alexandria and its named commissioners under authority of a judgment in rem, dated January 9, 1961, in the matter entitled "City of Alexandria vs. Chicago, Rock Island and Pacific Railroad Company," numbered 51,614 on the docket of the Ninth Judicial District Court, Rapides Parish, Louisiana, which judgment as affirmed by the Supreme Court of Louisiana on January 9, 1961 has become final, caused to issue to defendant, Grady L. Kelley, Jr., Sheriff of Rapides Parish, Louisiana, a writ of Fieri Facias, under which the Sheriff has seized and proposes to

sell at public sale the following property belonging to plaintiff, to-wit:

a. A tract of land bounded on one side by the property of W. Patrick Aertker and Charles S. Prosser and on the other side by the Brown-Roberts Hardware and Supply Company, Ltd., fronting 212.55 feet on Broadway Avenue.

b. A tract of land bounded on one side by New York Avenue and on the other side by property of the Louisiana and Arkansas Railway Company, fronting 2,533.44 feet on Broadway Avenue.

7. A portion of plaintiff's main line railroad into and out of Alexandria, Louisiana to Eunice, Louisiana is constructed, located and situated on the strips of land described in Paragraph 6 above. Plaintiff has no other route or alternative route from Alexandria to Eunice, Louisiana.

8. Plaintiff has made no application to the Supreme Court of the United States to review the decision of the Louisiana Supreme Court.

9. No application has been made to the Interstate Commerce Commission for the abandonment of that portion of plaintiff's main line constructed, located and situated on the property described in Finding 6.

10. The judgment of the City is in rem. Plaintiff is not indebted otherwise to the City of Alexandria nor to any of the other defendants, but plaintiff is owner of the property described in Finding 6.

11. Plaintiff does not deny the validity of the paving liens. Plaintiff does not deny the City's right to enforce its liens and to sell the properties if abandonment of that portion of its main line were to be authorized by the Commission.

12. All of the documents in Suit No. 51,614 of the docket of the Ninth Judicial District Court, Rapides Parish, Louisiana, entitled "City of Alexandria vs. Chicago, Rock Island and Pacific Railroad Company," have been received in evidence and are made a part hereof, including the writ of Fieri Facias; and the public advertisement of the proposed sale.

Plaintiff's position is that the proposed sale would accomplish an abandonment of its main line; that the Commission has exclusive jurisdiction to authorize such an abandonment and that the proposed sale and abandonment cannot be effected without prior authority of the Interstate Commerce Commission; and that such abandonment would cause irreparable damage and injury to the plaintiff and to the public in general.

Counsel have not cited, and we have not been able to find, where the precise issue has ever previously been resolved. The Supreme Court, in the *Choctaw* case,[1] held categorically that "street paving is a class of betterment to which the railroad right-of-way and station property is generally held to be subject." In *Choctaw*, the defendant railroad urged that "if the

[1] Choctaw O & G RR Co. v. Mackey, 256 U.S. 531, 41 S. Ct. 582 (1920).

assessment is left unpaid a sale to enforce the lien would sever an integral part of the right-of-way. The Court held that an assessment against a railroad right-of-way for a street improvement cannot be declared void because the effect of a sale to pay the assessment would result in the severance of an integral part of the right-of-way. They declined to discuss the methods and means that a lien holder was to pursue in enforcing the lien against a railroad in instances where interstate commerce would be affected, and disposed of the railroad's contention in these words:

> "If the validity of the assessment is established it may be assumed that due payment will follow. At all events, we have no occasion to deal with the method and means to be pursued enforcing it."

Perhaps the Supreme Court's assumption was correct and payment followed, but payment has not followed here. Necessarily, we must resolve whether a valid lien holder can sell railroad beds over which trains run in interstate commerce in the absence of approval by the Interstate Commerce Commission. The resolution of this issue requires us to make added findings which we now proceed to do:

13. Under the facts the sale of property upon which these tracks run would in effect constitute an abandonment. This abandonment stems from the substantial diminution in the ability of the railroad to discharge its responsibility inherent in its interstate operation.

To permit the sale of this property without safeguarding the area reserved for tracks would be the removing of one link from the connecting chain. The result would inevitably be the abandonment or discontinuance of a portion of the railroad's line or operation in the interstate field. *City of Des Moines v. Chicago and Northwestern Railway Company*, 8 Cir., 264 F. 2d 454; *Thompson v. Texas Mexican Railway Co.*, 328 U.S. 134, 66 S. Ct. 937; *Smith v. Hoboken Railroad Warehouse and Steamship Connection Co.*, 328 U.S. 123, 66 S. Ct. 947 (1956).

14. This abandonment would cause plaintiff irreparable injury and damage in that it would:

(a) Disrupt plaintiff's operations.

(b) Interrupt and prevent the transportation of goods and commodities in interstate commerce required of plaintiff under the provisions of the Interstate Commerce Act.

(c) Subject plaintiff and its officers to the threat of fines and penalties for failure to provide the services required under the provisions of the Act, and

(d) Subject plaintiff to the threat of innumerable suits for damages for failure to provide such services.

Under the facts hereinabove set forth, the provisions of the Interstate Commerce Act (49 U.S.C.A. 1, et seq.) afford a conclusive answer. The provisions of 49

U.S.C.A. 1(18) are absolute.[2] There is no requirement that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers who have an interest in the matter may take the initiative (*Thompson v. Texas Mexican Ry. Company*, 328 U.S. 134, 66 S. Ct. 937). The proposed sale would constitute an abandonment; no certificate has been obtained; plaintiff and the public would suffer irreparable damage if there were an abandonment; plaintiff is very much an interested party. It necessarily follows that plaintiff is entitled to a permanent injunction.[3]

This Court has enjoined this sale only as advertised. We feel it necessary to state that the injunction will be so worded that the City of Alexandria will not be left impotent in its desire to enforce its paving lien. The City clearly has two methods available to it. First, it can ask the Interstate Commerce Commission's permission to permit the abandonment of that portion of the railroad's main line upon which the lien has attached. Secondly, the City is free to advertise and sell all the land exclusive of a 20-foot strip over which the tracks run. The Supreme Court of Louisiana in this very case (*City of Alexandria v. Chicago, Rock Island and Pacific RR Co.*, 126 So. 2d 351, 1961) noted:

---

[2] "No carrier * * * shall abandon all or any portion of a line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate * * *."

[3] "Any * * * abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of * * * any party in interest * * *." 18 U.S.C.A. 1(20).

"The record discloses that the property of the defendant is assessed in the sum of $38,530.85. The value of the property is $78,500, exclusive of a 20 foot strip for defendant's tracks. The strip of land between the center of defendant's track and the edge of the pavement on Broadway Avenue is 75 feet in width and the strip of land between the center of defendant's track and New York Street, which borders defendant's property on the east, is 50 feet in width. Experts testified that the defendant's property between Broadway Avenue and the railroad track is an excellent site for warehouses and other business establishments."

CONCLUSION.

For the reasons assigned, the injunction is made permanent. It should be crystal clear that I deem it necessary to enjoin the City of Alexandria from selling the property as advertised because the sale as advertised would result in the sale of the roadbed (the actual tracks over which the train operates). The decree is to specifically "spell out" that the City is not enjoined from selling the railroad's property, exclusive of a 20-foot strip for defendant's tracks.

Proper decree should be submitted.

THUS DONE AND SIGNED at Lake Charles, Louisiana on this the 11th day of December, 1961.

EDWIN F. HUNTER, JR.,
United States District Judge.

APPENDIX B.

JUDGMENT.

Filed Feb. 1, 1962.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, ALEXANDRIA DIVISION.

CIVIL ACTION No. 8340.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

versus

CITY OF ALEXANDRIA, LOUISIANA; W. GEORGE BOWDON, JR., MAYOR OF THE CITY OF ALEXANDRIA; WILLIAM H. LAMBDIN, COMMISSIONER OF STREETS AND PARKS OF THE CITY OF ALEXANDRIA; LEROY G. WILSON, COMMISSIONER OF FINANCE AND UTILITIES OF THE CITY OF ALEXANDRIA; AND GRADY L. KELLEY, JR., SHERIFF OF RAPIDES PARISH, LOUISIANA.

This cause having come on for trial on the complaint of plaintiff and the answer and the motion to dismiss filed by defendants, a temporary restraining order having issued and having been continued by assent of counsel until such time as the Court shall have

rendered judgment on the application for a permanent injunction; a full hearing having been had; the Court having found facts and having made conclusions of law in favor thereof:

IT IS ORDERED, ADJUDGED AND DECREED that the defendants, City of Alexandria; W. George Bowdon, Jr., Mayor of the City of Alexandria; William H. Lambdin, Commissioner of Streets and Parks of the City of Alexandria; Leroy G. Wilson, Commissioner of Finance and Utilities of the City of Alexandria; and Grady L. Kelley, Jr., Sheriff of Rapides Parish, Louisiana, and each of them, their agents, servants, employees and attorneys, and all other persons in active concert or participation with them, be and they are hereby permanently restrained, enjoined and prohibited from selling or causing to be sold at public sale the following described property, to-wit:

a. A tract of land bounded on one side by the property of W. Patrick Aertker and Charles S. Prosser and on the other side by the Brown-Roberts Hardware and Supply Company, Ltd., fronting 212.55 feet on Broadway Avenue.

b. A tract of land bounded on one side by New York Avenue and on the other side by property of the Louisiana and Arkansas Railway Company, fronting 2,533.44 feet on Broadway Avenue.

this injunction being issued subject to defendants' right to:

(a) Apply to the Interstate Commerce Commission to permit abandonment of that portion of plaintiff's main line lying on and across the two above described tracts and upon issuance of a formal and enforceable order of abandonment by the Interstate Commerce Commission, this injunction shall become null and of no further effect;

(b) Sell at public sale the two above described tracts of land, less and except a 20-foot strip located ten (10) feet on either side of the center line of plaintiff's main line railroad tracks, the sale of which 20-foot strip shall continue to be enjoined under the provisions of this judgment until such time as the Interstate Commerce Commission has issued a formal and enforceable order of abandonment of that portion of plaintiff's main line lying on and across the two above described tracts. Upon issuance of said order by the Interstate Commerce Commission this injunction shall become null and of no further effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and its surety be released and relieved of any liability whatsoever on the account of the issuance of the temporary restraining order herein and that the bond furnished by plaintiff be and it is hereby cancelled.

Dated February 1st, 1962.

(S.) EDWIN F. HUNTER, JR.
Judge.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA.

This is to certify that the above and foregoing contained on this and preceding 2 pages is a true and correct copy of the original.

February 2, 1962.

ALTON L. CURTIS,
Clerk.
By CARMA I. GUIDRY,
Deputy Clerk.

APPENDIX C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19675

CITY OF ALEXANDRIA, LOUISIANA,
Appellant,

versus

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(November 30, 1962)

Before HUTCHESON, WISDOM, and GEWIN, Circuit Judges.

WISDOM, Circuit Judge: The unusual posture of the parties to this appeal relates to the enforcement of a city's paving lien when the property subject to the lien includes a portion of a railroad roadbed. The validity of the lien is not at issue. The question for decision is whether the city's enforcement of its lien by execution proceedings through seizure and sale of the property is tantamount to the railroad's "abandonment" of the line within the meaning of the Interstate Commerce

Act, 49 U.S.C.A. § 1 (18), prohibiting abandonments of line without the authority of the Interstate Commerce Commission.

The facts are not disputed. The Chicago, Rock Island & Pacific Railroad Company is an interstate common carrier. Its main line in Louisiana extends through the City of Alexandria. In 1958 the City levied a $38,530.85 paving assessment against Rock Island, one of 133 property owners abutting a newly paved avenue. For various reasons, Rock Island refused to pay the assessment.[1] The City sued the railroad company and obtained a judgment for the amount of the assessment; the Louisiana Supreme Court upheld the validity of the assessment and the lien. *City of Alexandria v. Chicago, Rock Island & Pacific R. R.*, 1961, 240 La. 1025, 126 So. 2d 351. After the judgment become final the City, following the usual Louisiana procedure, obtained a writ of *fiere facias* to the Sheriff of Rapides Parish; the Sheriff seized the two tracts of railroad property subject to the paving lien and gave notice that the property would be sold at public auction.[2] Rock Island admits that the lien covered the entire tracts, including the roadbed. June 23, 1961, Rock Island obtained a temporary restraining order

[1] In the state courts Rock Island contended that its property did not abut the street; that the assessment was so arbitrary and confiscatory as to render the assessment unconstitutional; that Rock Island was relieved of liability for paving by virtue of an agreement it had with the Police Jury of Rapides Parish.

[2] Witnesses testified that the property subject to the paving lien was worth $78,500, exclusive of the twenty-foot strip on which the tracks are located. However, Rock Island, in its defense to the suit in the state court, alleged that the amount of the lien exceeded the value of the property. Rock Island admits that the lien covers all of its property abutting Broadway Avenue; the paving of which gave rise to this litigation.

from the United States District Court. Subsequently, after a hearing largely devoted to showing the interstate character of Rock Island's operations, the District Court held that "the sale of property upon which these tracks run would in effect constitute an abandonment". The court permanently enjoined the City of Alexandria from selling a twenty-foot strip of land, described as the right-of-way on which the railroad tracks are located, without first obtaining permission from the Interstate Commerce Commission for an "*abandonment*" of that part of the Rock Island's line. The court left the City free to sell the railroad company's other land, extending about sixty-five feet to the west and forty feet to the east of the twenty-foot strip. The City appeals from this order.

Subsection 18 of Section 1 of the Interstate Commerce Act (49 U.S.C.A. § 1 (18)) provides that

> ". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall have first obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Subsection 20 (49 U.S.C.A. § 1 (20)) provides that "any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Com-

mission, any commission or regulating body of the State or States affected, or any party in interest. . . ." These provisions of the Act vest the Interstate Commerce Commission with jurisdiction over abandonments and impose on carriers the duty of obtaining a certificate of convenience and necessity whenever there is an abandonment. *Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co.*, 1946, 328 U. S. 123, 66 S. Ct. 947, 90 L. Ed. 1123; *Thompson v. Texas Mexican R. R.*, 1946, 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132. This jurisdiction attaches whenever there is present "any question, necessary to a judicial disposition, relating to change in the railroad line or operation, on which there is room for colorable doubt or controversy as to whether public convenience and necessity is involved or affected, and in which it therefore may be possible for an abandonment to be present in a transportational sense, even though not by general legal criterion." *City of Des Moines v. Chicago & North Western R. R.*, 8 Cir., 1959, 264 F. 2d 454, 458. Since, argues Rock Island, the sale of its roadbed would constitute the abandonment of a portion of its line, this cannot be accomplished without a certificate from the Interstate Commerce Commission, for there is at least a "colorable doubt" as to its effect on public convenience and necessity.

The Interstate Commerce Commission requires an intention to abandon. Thus, the Commission has defined "abandonment" as used in Section 1 (18) as requiring "cessation of service . . . or long disuse of the line, coupled with the intention not to resume such service or use." Akron & Barberton Belt R. R. Abandonment

of Operation, 239 I.C.C. 250, 254. In *Williams v. Atlantic Coast Line R. Co.*, 4 Cir., 1927, 17 F. 2d 17, 22, the Court said: "Abandonment involves more than mere nonuser. There must be an intention on the part of the company to abandon." See also *Wheeling & Lake Erie Ry. Co. v. Pittsburgh & West Virginia Ry. Co.*, 6 Cir., 33 F. 2d 390, 392; *City of Flint v. Grand Trunk Western R. R. Co.*, 6 Cir., 69 F. 2d 604, 606; *Myers v. Arkansas & Ozarks Ry. Corp.*, 1960, 18 F. Supp. 36, 41.

Not every change in ownership or mode of operation constitutes an abandonment. No Commission approval is necessary where the cessation of operations results not from the volition of the railroad but as a result of conditions over which the railroad has no control. *Zirn v. Hanover Bank*, 2 Cir., 1954, 215 F. 2d 63. See *Myers v. Arkansas and Ozarks Ry. Corp.*, 1960, 185 F. Supp. 36.

The short answer to Rock Island's contention is that the record shows no evidence whatever of any intention to abandon or that there will be any abandonment. There has been no interruption or discontinuance of services in the operation of the railroad in Alexandria, and the City has no intention to interfere with the operation of the company's line. The attorneys for Rock Island assert that Rock Island intends *not* to abandon operations or to abandon any portion of its line in Alexandria. This is an extraordinary situation, one that causes the Court to wonder what all the shouting is about. If Rock Island intends not to abandon any portion of its line or any operation in Alexandria, there is an obvious solution: Rock Island should pay the judgment against it. If

Rock Island intends to refrain from doing what comes naturally, that is, paying the assessment in order to avoid any interruption of operations, then it might be said that the sale constituted an abandonment—but that would be Rock Island's deliberate decision. In such case, Rock Island is under a duty to apply to the Interstate Commerce Commission for a certificate permitting abandonment of part of its line. The duty is on the carrier to initiate such action; there is no reason to impose responsibility for initiating action on a lienholder or judgment creditor who should be able to assume that a railroad company will honor its legal obligations and not force a sale at public auction. And, even if there should be a forced sale, there is nothing to prevent Rock Island from buying in the property. Finally, even a transfer of title to a third person is not necessarily inconsistent with the railroad's continued operation of the line; operations could continue without interruption, as a result of the railroad's negotiations with the purchaser or the railroad's exercising its right of eminent domain under Louisiana law.

The Commission's ruling in *Application of Illinois Terminal Railroad Co.*, I.C.C. Finance Docket No. 20388 (1958), lends scant support to Rock Island's contention. There, the railroad applied for permission to sell a bridge and its elevated rail approaches to the City of Venice, Illinois; Venice would, concurrently with the sale, lease back to the railroad the exclusive right to use the bridge for railroad operations. The Commission held that the proposed transactions constituted "an abandonment and an acquisition of a portion of a line

of railroad" under Section 1 (18).[3] The crucial language is:

> "If a railroad in such manner and without our approval may dispose of its interest in all or a part of its line, and in substitution thereof *acquire a sharply limited leasehold or similar interest under terms over which we may exercise no control*, it could thereby disable itself from fulfilling its common carrier obligations. Thus, the purpose and intent of section 1 (18), which we are required to administer and enforce with a view to carrying out the expressed national transportation policy of the Congress, would be defeated." (Emphasis added)

In that case, by its application to the Commission, Illinois Central made clear its intention to sell part of its line and to acquire a line (by lease-back) under terms over which the Commission had no control. Here, on the other hand, there is nothing in the record to show that Rock Island intends to permit the property to be sold to others or to permit any interruption in its operations in Alexandria.

[3] If the Commission's opinion is construed as holding that any change in title constitutes abandonment requiring Commission approval under Section 1 (18), such a holding is not supported by court decisions. See, e.g., Zirn v. Hanover Bank, 2 Cir., 1954, 215 F. 2d 63. An abandonment means "any discontinuance of operations by the party presently operating." In re Boston Terminal Co., D. Mass. 1947, 71 F. Supp. 472, and seems to require an intent to abandon. However, the abandonment of a line by one carrier with an acquisition of trackage rights over the parallel lines of another carrier—the situation to which the Commission in *Application of Illinois Terminal Railroad Company* analogized the sale and lease back—does fall within the accepted definition of an abandonment as an actual cessation of operations over a line of track.

The validity of special assessment liens against railroad property was upheld by the Supreme Court in *Mackey v. Choctaw, O. & G. R.R.*, 1921, 256 U. S. 531, 41 S. Ct. 582, 65 L. Ed. 1076. That case dealt with a railroad right-of-way over Indian lands. The railroad company contended that enforcement of the assessments by sale would sever an integral part of the railway and would prevent the defendant from performing its duty as a carrier. The Court of Appeals said:

> "*But if it is their [the railroads'] duty to pay and to save the property from tax sale and dismemberment, they cannot well plead their own default.* It is settled that a railroad right-of-way is subject to general taxation, even one granted by Congress over an Indian reservation. . . . The general rule, sustained by the weight of authority, is that a railroad right-of-way, whether owned in fee or held in easement, is real estate, property or ground which may be subjected to assessment for the cost of local improvements." (Emphasis added.) 261 F. 342, 344.

The Supreme Court affirmed the judgment. "If the validity of the assessment is established, it may be assumed that due payment will follow." The Court held that the mere fact that the property was useful to the United States did not relieve the railroad company from being taxed for street paving. The Court said:

> "Street paving is a class of betterment to which the railroad right-of-way and station property are generally held to be subject. . . . (citing

authorities) *It is urged that, if the assessment is left unpaid, a sale to enforce the lien would sever an integral part of the railroad. The same objection might be urged against the validity of a lien for general taxes locally assessed upon railroad property, or a mechanics' lien upon the same.* The objection is clearly unsound." (Emphasis added.) 256 U. S. 531.

The facts giving rise to the Choctaw decision occurred before enactment of the Transportation Act of 1920 (the Interstate Commerce Act) prohibiting abandonments of line without authority of the Interstate Commerce Commission. Moreover, the Supreme Court pointed out that it had "no occasion to deal now with the method or means to be pursued in enforcing" the assessment. However, Rock Island makes the same argument against enforcement that Choctaw made against assessment. We react as the courts did in the Choctaw case: It is up to the railroad to prevent any interruption of operations or severance of a segment of line by prompt payment of valid assessments.

If the railroad's position were accepted, all taxing bodies—municipal, state and federal—would be seriously hampered in their efforts to collect taxes levied against railroad property. The real estate, physical plant, and rolling stock of a railroad would be completely exempt from levy of execution—unless the State or the Federal Government first initiated proceedings for a certificate of convenience and necessity from the Interstate Commerce Commission and then, after a hearing,

convinced the Commission that a sale of the property would be in the public interest.

Rock Island presents a new twist in the pseudo-legal doctrine of interposition: it seeks to interpose the Interstate Commerce Commission between railroads and any federal, state, or municipal body attempting to collect an unpaid tax by executing a lien levied on railroad property—even when the railroad concedes the validity of the tax and the lien, and when payment will avoid a forced sale. There is nothing in the language of subsection 18 of the Interstate Commerce Act and nothing in the legislative history of the Act to lead us to believe that Congress intended any such exhaltation of the Commission in this federal system of ours.

The judgment is REVERSED and REMANDED with instructions to dissolve the injunction.

A true copy.

Test:

(Seal) EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit,
By R. E. WINDHORST, JR.
Deputy

New Orleans, Louisiana, Aug. 8, 1963

APPENDIX D.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19675

CITY OF ALEXANDRIA, LOUISIANA,
Appellant,

versus

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(July 30, 1963.)

ON PETITION FOR REHEARING.

Before HUTCHESON, WISDOM and GEWIN, Circuit Judges.

WISDOM, Circuit Judge: In support of its petition for a rehearing of the appeal in this cause, the Chicago, Rock Island and Pacific Railroad Company, filed an exceptionally forceful brief. The petitioner asserted that the Court's opinion is "directly contrary to the jurisprudence" and, in effect, "overrules" *Smith v. Hoboken R.W. & S.C.Co.*, 1946 328 U. S. 123, 66 S. Ct. 937, 90 L. Ed.

1132, *Thompson v. Texas Mexican Ry.*, 1946, 328 U. S. 134, 66 S. Ct. 937, 90 L. Ed. 1132, and *City of Des Moines v. Chicago & N.W. Ry.*, 8 Cir. 1959, 264 F.2d 454. The vigor and earnestness of the brief persuaded the Court to take a close, hard look at our original opinion. Having scrutinized the cases on which Rock Island relies, we reaffirm the correctness of our original decision.

In *Smith v. Hoboken* the Supreme Court decided that a bankruptcy court could not allow the forfeiture of a lease when the lessee had not obtained a certificate from the Interstate Commerce Commission permitting the railroad to abandon the lines covered. The lessor claimed under a provision providing for forfeiture in the event of assignment. In deciding that the forfeiture provision could not be enforced without the determination of the abandonment question by the ICC, the court made the following comment:

> Forfeiture of a lease in accordance with the provisions of § 70(b) may be wholly consistent with the preparation of a plan of reorganization under § 77. But, as we have said, the nature of the reorganization to be submitted is entrusted primarily to the Commission. If forfeiture of leases can be decreed without prior reference of the matter to the Commission, it may be seriously embarrassed in preparing the plan which it deems necessary or desirable for the reorganization of the debtor. 328 U. S. at 132-33.

This comment is the key to the proper interpretation of the case. The Court was mainly concerned over the proper adjustment of the Interstate Commerce Act with the Bankruptcy Act. Quite properly, the Court recognized that the primary responsibility for reorganizing railroads in financial difficulty lies with the Commission. The Commission should not be hampered in its operations by judicial decrees unduly encroaching into this territory. In addition, there is a very real distinction which removes the instant case from the *Smith* rule. This is the fact that here there is no actual or indeed threatened abandonment. Rock Island denies that it intends to abandon the Alexandria line. No one is threatening to disturb the Railroad's right of way. No one desires to cause a discontinuance of the service. The law is clear that an assessment against a railroad is valid. *E.g., Branson v. Bush*, 1919, 251 U. S. 182, 40 S. Ct. 113, 64 L. Ed. 215. Whether the judgment be denoted as in rem, in personam or whatever, the fact remains that the assessment upon which it is based is payable by the road. Some means must be available to a creditor to enforce collection against a solvent railroad without compelling the creditor to initiate an abandonment procedure before the Interstate Commerce Commission. The simple change of legal relationship which will take place if the Railroad is forced to pay its legal debts can not amount to an abandonment.

The same considerations apply in distinguishing *Thompson*. There a railroad attempted to exercise its right to "terminate and cancel" a trackage contract with the trustee of a bankrupt road. After purportedly

exercising this right, the lessor upped the ante for the use of the tracks. The trustee refused to pay anything higher than the contract rate. This difference of opinion led to a law suit in the state court in which the lessor prayed for an injunction against the trustee's use of the tracks and recovery of $500 a day for past damages or, alternatively, the reasonable value of the use of the tracks. The state court awarded damages but denied the injunction. The Supreme Court reversed, holding that the Commission should pass on all the "terms and conditions" of the trackage agreement, including the abandonment issue. The entire arrangement was within the peculiar competency of the ICC and the Court rule that it should play its part in the affair before the courts intervened. The trackage agreement in all its ramifications vitally affected the goal of an orderly, integrated rail transportation system.

The facts in *City of Des Moines v. Chicago & N.W. Ry.*, 8 Cir. 1959, 264 F.2d 454 are only superficially close to the facts here. In that case the city, claiming that the railway had violated an "ordinance" upon which its right to operate in the city's streets depended, decreed an ouster of the railway from the city's street. It went into the state court demanding an injunction along the lines of its decree. The case was removed by the Railway to the federal district court which dismissed the complaint. The Eighth Circuit "remanded", directing the trial court to retain jurisdiction pending disposition of the abandonment issue by the ICC. The court commented:

> Regardless, however, of whether a valid forfeiture would have existed under the ordinance, a court could still not decree an ouster of the Railway from the street, so long as this might mean an abandonment or discontinuance of a portion of the Railway's line or operation in the interstate field, until the Interstate Commerce Commission gave its permission to such abandonment or discontinuance being made. 264 F.2d at 457.

Therein lies the essential difference between that case and the one here. The city was demanding that the Railroad physically remove its main track from where it lay. Clearly, the Commission alone had the authority to allow the move to be made.

Rock Island's reliance on *Miller v. Climax Molybdenum Co.*, 10 Cir. 1938, 96 F.2d 254, is plainly inappropriate. There *Climax Molybdenum* sought successfully to enjoin *Miller* and a corporation closely connected with him from specifically enforcing a contract of sale against a railroad company (the Colorado and Southern) which had sought unsuccessfully to gain permission from the Commission to abandon this part of its line. In sustaining the trial court's injunction the court commented:

> We think each of the suits brought in the state court against the Colorado and Southern Railway Company by Miller and the South Park Railroad Company threatened violation of the order of the Interstate Commerce Commission that the Colorado and Southern should continue

operation of that part of the line between Climax and Leadville. 96 F.2d at 259-60.

There is no threat of violation of any order of the Commission in the instant case.

A district court decision not cited in our earlier opinion supports our conclusion, although we are not required to go as far as that court went. In *Town of Conway v. Atlantic Coast Line R.R.*, E.D.S.C., 20 F.2d 250, *appeal dismissed by stipulation of the parties*, 4 Cir. 1926, 15 F.2d 1008, the town sought to compel the railroad to remove its tracks from a street where the town claimed it had no right to be. The court agreed that the railroad was not entitled to be where it was and granted the relief. In doing so the court spoke as follows in regard to the railroad's contention that the court could not order the removal until the ICC had passed on the matter:

> The theory of the defendant is that the Transportation Act, as construed by the cases referred to, constituted a new departure, and sought affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country, and that the power to order the abandonment of any track is now lodged solely in the Interstate Commerce Commission, and no change can be made without its consent. But I do not construe the act to apply to a case like the one at bar. The defendant

> does not seek to abandon a portion of its track. Nor does the town seek to compel it to abandon a portion where it has a legal right to remain. The act of Congress was intended to apply to those cases where the railroad company seeks to abandon a portion of its line of railroad, and possibly where it is sought to compel it to make such abandonment; but it was not intended to apply to those cases where the railroad is a trespasser, or where the railroad's occupancy is only by permission, and such permission has been revoked. 20 F.2d at 260.

Rock Island and the City agree that they do not want the Alexandria railroad abandoned. Yet here is a solvent railroad which can remove any question of abandonment by the simple expedient of paying a debt the Supreme Court of Louisiana has adjudged to be a just debt supported by a valid lien. We do not think that Commerce Act contemplated that a creditor would have to initiate "abandonment" proceedings in order to collect a relatively small just debt from a solvent railroad. "Abandonment" under the Act has a peculiar meaning, one that may even do violence to the ordinary acceptance of the term. But it is not that peculiar. If it is—and we say it is not—then the determination not to pay the just debt is entirely within the volition of the railroad. In the absence of any help from the statute on this point, the burden of going forward before the Commission ought to fall on the railroad.

It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

A true copy.

Test:

(Seal)

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.
By R. E. WINDHORST, JR.,
Deputy.

New Orleans, Louisiana, Aug. 8, 1963.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19675

CITY OF ALEXANDRIA, LOUISIANA,
Appellant,

versus

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the

writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 8th day of August, 1963.

(S.) JOHN MINOR WISDOM,
United States Circuit Judge.

(ORIGINAL FILED—AUGUST 8, 1963)

APPENDIX F.

STATUTES INVOLVED.

"49 U. S. C. A. 1 (1) The provisions of this chapter shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or. . . . . "

"49 U. S. C. A. 1 (4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to Chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which

shall not unduly prefer or prejudice any of such participating carriers.

"49 U. S. C. A. 1 (18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

"49 U. S. C. A. 1 (19) The application for issuance of any such certificate shall be under such rules and regulations as to hearings and other

matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad or the operation thereof is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each country in or through which said line of railroad is constructed or operates.

"49 U. S. C. A. 1 (20) The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and

proceed with the construction, operation or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

APPENDIX G.

JUDGMENT.

NINTH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES
STATE OF LOUISIANA

No. 51,614

CITY OF ALEXANDRIA

versus

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY.

THIS CAUSE came on for trial pursuant to assignment, was called and trial had. After considering the pleadings, the evidence and the argument of counsel as set forth in their briefs, the Court having found that the law and the evidence are in favor of plaintiff and against defendant for the reasons assigned in the written opinion filed herein on June 1st, 1960.

It is ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the City of Alexandria and against the Chicago, Rock Island and Pacific Railroad Company for TWO THOUSAND, NINE HUNDRED EIGHTY TWO AND 43/100 ($2,982.43) DOLLARS, with six percent (6%) per annum interest thereon from January 1st, 1959 until paid plus ten percent (10%) ad-

ditional on principal and interest as attorneys fees with recognition of the City's lien and privilege for said amount against a tract of land fronting 212.55 feet on Broadway Avenue bounded on one side by the property of W. Patrick Aertker and Charles S. Prosser and on the other side by Brown-Roberts Hardware Supply Company, Ltd. and covered by Assessment No. 68 of Local Assessment Ordinance No. 675 recorded May 28, 1958 in Mortgage Book 433, Page 49 of the records of Rapides Parish, said judgment to be in rem only and limited in its effect to the foregoing property.

It is further ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the City of Alexandria and against the Chicago, Rock Island and Pacific Railroad Company for THIRTY FIVE THOUSAND, FIVE HUNDRED FORTY EIGHT AND 42 100 ($35,548.42) DOLLARS, with six percent (6%) per annum interest thereon from January 1st, 1959 until paid plus ten percent (10%) additional on principal and interest as attorneys fees with recognition of the City's lien and privilege for said amount against a tract of land fronting 2,533.44 feet on Broadway Avenue bounded on one side by New York Avenue and on the other side by property of the Louisiana and Arkansas Railway Company, and covered by Assessment No. 127 of Local Assessment Ordinance No. 675 recorded May 28, 1958 in Mortgage Book 433, Page 49 of the records of Rapides Parish, said judgment to be in rem only and limited in its effect to the foregoing property.

It is further ORDERED, ADJUDGED AND DECREED that the City of Alexandria has a lien and privilege

against the above properties for the respective amounts of paving assessed against each which outranks all other liens, privileges or encumbrances except taxes.

It is further ORDERED, ADJUDGED AND DECREED that the Sheriff of the Parish of Rapides be authorized and directed to seize, and sell separately the lots or parcels of ground above described after due advertisement and according to law; and that out of the proceeds of the sale of each lot or parcel of ground above described, the City be paid the amount of its claim for paving against said tract by preference and priority over all other claims except taxes.

Judgment rendered in open Court on the first day of June, 1960.

Judgment read and signed in open Court the 7th day of June, 1960.

(S.) W. A. CULPEPPER,
Judge.

Filed in Open Court June 7, 1960.

(S.) VIRGIE W. MIDDLETON,
(Virgie W. Middleton),
Deputy Clerk of Court.

STATE OF LOUISIANA,
PARISH OF RAPIDES.

I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN THIS OFFICE.

IN FAITH WHEREOF, WITNESS MY HAND AND SEAL OF OFFICE, AT ALEXANDRIA, LOUISIANA, THIS 20 DAY OF June A. D. 1961.

P. M. DYER, JR.,
Clerk of Court.
By (S.) ERNESTINE C. FRENCH,
Dy. Clerk of Court.

NOTE: The foregoing judgment is also marked "P-1" and bears the following stamp:

U. S. DISTRICT COURT
Western District of Louisiana
FILED IN EVIDENCE
Oct. 20, 1961
Alton L. Curtis, Clerk

APPENDIX H.

REPORT OF THE COMMISSION

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 20388

ILLINOIS TERMINAL RAILROAD COMPANY—ABANDONMENT, ETC.—McKINLEY BRIDGE PROPERTIES

Decided November 17, 1958

Certificate issued permitting (a) abandonment by the Illinois Terminal Railroad Company of that portion of its line of railroad over the McKinley Bridge between St. Louis, Mo., and Venice, Ill., and approaches thereto, by sale thereof to the city of Venice, and (b) authorizing acquisition and operation by the Illinois Terminal Railroad Company of the aforesaid line of railroad. Conditions prescribed.

George E. Lee for applicant.

DIVISION 4. COMMISSIONERS MITCHELL, ARPAIA, AND McPHERSON BY DIVISION 4.

The Illinois Terminal Railroad Company, a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act, as amended, on October 28, 1958, applied for permission under section 1(18) of that act (a) to abandon that portion of its line of railroad over the so-called McKinley Bridge including the vehicular and elevated rail approaches thereto, extending from St. Louis, Mo., across the

Mississippi River, to Venice, Ill., approximately 1.979 miles, all in St. Louis, Mo., and Madison County, Ill., and (b) to acquire from the city of Venice the right to use and operate over the railroad tracks and facilities on the bridge and elevated railroad approaches, for a period of 50 years and successive 50 year periods in perpetuity at Illinois Terminal Railroad Company's option. No objection to the application has been presented.

Under the proposed transaction the applicant will sell the bridge properties to the city of Venice; and that body concurrently will convey to the applicant the exclusive right to use and operate the railroad portions of the bridge for railroad operations. The applicant states its operations and service between, in and through St. Louis and Venice will continue to be provided and maintained without any interruption whatsoever, and there is no intention on the part of the applicant to abandon, in any respect, its service or operations presently existing. Accordingly, the applicant suggests that the proposed sale does not constitute an abandonment of the applicant's line of railroad upon the bridge and the rail approaches thereto within the meaning of section 1(18), that, there being no abandonment, there is no acquisition of a line of railroad within the meaning of that section, and that the application should be dismissed.

History and details of transaction.—In Finance Docket No. 18752, *Illinois-Missouri Term. Ry. Co. Et Al. Purchase, Etc.*, by report and order dated April 2,

1956 this Commission authorized, among other things, the Illinois-Missouri Terminal Railway Company, subsequently renamed Illinois Terminal Railroad Company, to purchase the properties and assets of the then existing Illinois Terminal Railroad Company, and authorized a number of class I railroads to acquire control of the purchaser. In connection therewith the Commission also authorized the issuance by the applicant of its note in the principal amount of $20,015,635 for the acquisition of such properties. Included in the properties was the McKinley Bridge and the Commission, in its report stated:

> It is intended that, contemporaneously with the conveyance to Illinois-Missouri of the properties and assets of Illinois Terminal, the former will sell to Bi-State, or such other purchaser as may be acceptable to it, for the sum of $13,500,000, the McKinley bridge property, excluding the rail approaches thereto, and that Bi-State will lease to Illinois-Missouri for a period of 40 years or for such other term as agreed to, the railroad tracks and other rail facilities located on the bridge with the exclusive right in Illinois-Missouri to the use of such tracks and railroad facilities during the term of the lease.

The evidence in that proceeding, as well as the evidence supporting the applicant's petition for extending the date of maturity of the note, which petition was granted by supplemental order dated June 9, 1958, was to the effect that the note was to provide interim financing of the purchase price of the properties of the Illinois Terminal Railroad Company pending the

sale of the bridge properties. If the bridge properties were sold the proceeds received from such sale would be applied to reduce the principal due on the note and the remainder financed on a permanent basis through the issuance of stock, bonds, or otherwise, after this Commission's approval.

While the sale of the bridge properties was discussed in the report of April 2, 1956, neither that decision nor the order purported to grant any authority which might be necessary under the act to carry out such plan nor did the applicant in that proceeding seek such authority. The applicant states that the matter of such sale was presented as a matter of information in order to fully disclose all aspects of the purchase transaction and to show the financial effect of the sale of the bridge properties.

Although it was originally intended that the bridge properties be sold to the Bi-State Development Agency, the transaction with that agency was not consummated. Thereafter, under date of June 11, 1958, the applicant entered into an agreement with The Sarjem Corporation, acting as agent for the city of Venice, providing for the sale of the McKinley bridge properties by the applicant to the city. This agreement was supplemented under date of September 11, 1958.

The line of railroad involved herein extends from a point on the elevated railroad approach in Illinois at the east city limits of the city of Venice across the McKinley Bridge to a point on the elevated railroad

approach in Missouri, which is 239.7 feet north of and parallel with the north line of Dock Street extended eastwardly in the city of St. Louis. The length of the first main track on the line is 1.979 miles and the length of second main track is 1.299 miles. The bridge itself, as described in the purchase proceeding, Finance Docket No. 18752, is a toll bridge consisting of a single deck over which both rail and vehicular traffic pass, with the vehicular approaches diverging at each end of the bridge from the long elevated rail approaches.

The city of Venice proposes to finance the purchase by the issuance of Series "A" Revenue Bonds from the proceeds of which $9,000,000 in cash will be paid to applicant, and in addition, the applicant will receive $11,000,000 principal amount of city of Venice 40 year 2 percent Series "B" Subordinate Revenue Bonds.

Under a proposed "Railroad Agreement", copy of which is attached to the application, the city will grant unto the applicant the right to operate its trains over the bridge and considered line of railroad, which right will be exclusive except that applicant may grant trackage rights to other railroads. Applicant will be obligated at its own expense to maintain, and make such additions and betterments as it may require, upon the line of railroad (but not including the bridge deck and roadway adjacent to and between each of the rails and the double tracks) and the elevated railroad approaches. Other provisions are included in the agreement defining the rights and obligations of the

parties in respect of general maintenance, carrying of insurance, liability for damages, etc. The agreement provides for the continued use of the bridge, railroad approaches, and railroad facilities by the applicant without interruption for an initial period of 50 years and successive periods of 50 years in perpetuity at the option of the applicant. The basic rental payable by the applicant will be an amount not exceeding $250,000 annually, if the coupon rate of the Series "A" Bonds is 5 percent, plus $25,000 in the first year, $20,000 in the second year, $15,000 in the third year, $10,000 in the fourth year, and $5,000 in the fifth year. If the Series "A" Bonds can be marketed at a coupon rate less than 4.95 percent, then the applicable annual rental will be revised downward on a graduated scale for each 0.05 of a point, and if the interest rate is under 4.50 percent the rental would be $200,000 annually. Upon retirement or refunding of all the Series "A" and "B" bonds the basic rental will be reduced to $25,000 per annum. In addition to the basic rental the applicant will be required to pay $1.00 for each loaded or empty freight car, caboose, and locomotive in excess of 200,000 units of such equipment which cross the bridge in any one year.

Eleven railroad companies, proprietary owners of the applicant, will agree by joint and several covenant to pay any installments of basic rent required by the terms if applicant should default in payment of same.

The line is maintained sufficiently to enable the applicant to continue its existing operations as is contemplated by the transactions described. Based

upon 1956 cost indices used by this Commission, the cost of reproduction new, less depreciation, of all properties to be conveyed by the applicant to the city of Venice is estimated at $14,582,630. For income tax purposes the Internal Revenue Service has placed a value thereon of approximately $8,950,000. The valuation based upon capitalization at 6 percent of net income from the highway and rail deck of the bridge, after deduction of allocated fixed charges (4 percent of $9,000,000) and allowance for income taxes on the remainder, is estimated at $8,135,300. For the years 1956 and 1957 a segregated income statement of the applicant for the McKinley Bridge property shows net income before income taxes of $734,375 and $654,841, respectively, from railroad operations, $594,503 and $591,291, respectively, from vehicular roadway and miscellaneous operations, and total net income before income taxes, of $1,328,879 and $1,246,132. In those years 74,972 and 64,874 carloads of freight moved over the bridge.

Jurisdiction.—As heretofore mentioned, the applicant challenges our jurisdiction in the premises. The application has been filed in order to obtain such approval as may be necessary to remove all legal hindrances or impediments which may exist and permit the consummation of the transactions without further delay. The exact question here involved has never been presented for our consideration.

Under section 1(18) of the act it is made unlawful for any carrier by railroad to abandon all or any

portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained a certificate from this Commission that the present or future public convenience and necessity permit of such abandonment. The provision is two-fold, applying not only to abandonment of operation but also to abandonment of "all or any portion of a line of railroad". That the track over the approaches and the bridge constitute a portion of the main line of the applicant is indisputable. The fact that the applicant, after it conveys the title to the city, will be granted rights to operate over the railroad portions of the bridge and approaches does not alter the nature of the antecedent sale, under which it will dispose of all its rights in the line.

A somewhat similar situation to that presented here is where a line of railroad is to be abandoned and in lieu thereof the carrier acquires trackage rights over, or joint use of, the paralleling lines of another. In such cases we have held, that approval of this Commission is necessary under section 1(18) for the abandonment and for construction of connecting tracks that may be required, and that appropriate authority also must be obtained for use of the parallel tracks. *Sacramento N. Ry. Trackage Rights*, 290 I.C.C. 145, and 290 I.C.C. 229. In Finance Docket No. 18992, *Great Northern R. Co. Acquisition*, 295 I.C.C. ..... (not printed in full), decided December 6, 1955, we took jurisdiction over a transaction involving abandonment by the Great Northern and the Minneapolis, St. Paul and Sault Ste. Marie Railway Company of cer-

tain segments of their respective lines and the acquisition by them of an undivided one-half interest in, and joint use of, the paralleling line of the other.

Even if the two conveyances, or grants, here involved, i.e., the sale and the lease-back, are considered as a single transaction, it is clear that the result thereof will be a substantial diminution in the applicant's title, and to the extent of such diminution there will be a relinquishment, or abandonment, by the applicant of the line of railroad involved. The fact that the lease is for a long term, with options to renew in perpetuity, is not material in determining our jurisdiction. Under the theory advanced by applicant, since there is no immediate intention to abandon operation, section 1(18) would not apply even if the term of the lease-back were limited to one year and regardless of the terms, onerous or otherwise, which might be imposed upon the carrier as a condition to exercise of its right to operate over its line. If a railroad in such manner and without our approval may dispose of its interest in all or a part of its line, and in substitution thereof acquire a sharply limited leasehold or similar interest under terms over which we may exercise no control, it could thereby disable itself from fulfilling its common carrier obligations. Thus, the purpose and intent of section 1(18), which we are required to administer and enforce with a view to carrying out the expressed national transportation policy of the Congress, would be defeated.

We conclude and find that the proposed transactions constitute an abandonment and an acquisition of a portion of a line of railroad by the applicant herein subject to our jurisdiction under the provisions of section 1(18).

Conclusions and findings.—The transactions proposed will permit the applicant to retain the use of the rail facilities on the bridge at a reasonable rental and enable the applicant to go forward with its plan for permanent financing. There will be no interruption of service on the line. It is clear that the proposals in this proceeding are part of a plan to promote economy in operation and assist the broader plan involved in Finance Docket No. 18752, *supra*. Such plan has been found to be consistent with the public interest, and the same conclusion is warranted here.

In Finance Docket No. 18752, *supra*, the Commission was aware that in the event the bridge properties were sold there were some employees of the then Illinois Terminal used in various capacities in the operation of the McKinley Bridge who might be adversely affected. It was concluded, such employees should be protected and the approval in that proceeding was conditioned on the protective conditions as set forth in *Oklahoma Ry. Co. Trustee Abandonment*, 257 I.C.C. 177. In the present proceeding the applicant has no objection to the imposition of the conditions set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, which are those usually prescribed in abandon-

ment cases and in substance the same as those first mentioned. Such conditions will be prescribed. Representative of certain of the employees have entered into an agreement with the applicant with respect to the protection which will be afforded employees affected by the transaction. Prescription of the aforementioned condition shall not be construed to preclude the carrying out of any agreement which the applicant has entered into or may enter into with its employees covering the subject matter.

Subject to the conditions for protection of employees referred to above, we find that the present and future public convenience and necessity (a) permit abandonment by the Illinois Terminal Railroad Company by sale to the city of Venice, Ill., of that portion of its line of railroad over the McKinley Bridge between St. Louis, Mo., and Venice, Ill., and approaches thereto, and (b) require the acquisition and operation by the Illinois Terminal Railroad Company under the terms and conditions described and referred to above of the said line of railroad.

An appropriate certificate will be issued in which provision will be made for the submission of journal entries.

ARPAIA, *Commissioner*, being necessarily absent, did not participate in the disposition of this proceeding.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 17th day of November, A. D. 1958.

Finance Docket No. 20388

ILLINOIS TERMINAL RAILROAD COMPANY—ABANDONMENT, ETC.—McKINLEY BRIDGE PROPERTIES

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That, subject to the conditions for the protection of employees referred to in said report, the present and future public convenience and necessity (a) permit abandonment by the Illinois Terminal Railroad Company of that portion of its line of railroad over the McKinley Bridge and approaches thereto, in St. Louis, Mo., and Madison County, Ill., and (b) require the acquisition and operation by the Illinois Terminal Railroad Company of the said line of railroad, as described in the report aforesaid;

It is ordered, That this certificate shall take effect and be in force from and after 1 day from its date;

It is further ordered, That, if the authority herein granted is exercised, the Illinois Terminal Railroad Company shall submit for the consideration and approval of this Commission, two copies of the journal entries proposed to record the transaction.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(Seal)